

Law and Business Review of the Americas

Volume 2 | Number 1

Article 9

1996

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Recommended Citation

Luis R. Vera-Morales, *Environmental Issues Arising from the Mayan Gate Pier Project in Cozumel, Quintana Roo, Mexico*, 2 LAW & BUS. REV. AM. 44 (1996)
<https://scholar.smu.edu/lbra/vol2/iss1/9>

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Environmental Issues Arising from the Mayan Gate Pier Project in Cozumel, Quintana Roo, Mexico

by Luis R. Vera-Morales*

If Mexico allows this pier to be constructed over the living Paraiso Reef in Cozumel Marine Refuge, it will signal that the National Parks of Mexico are for sale... The possibility of building the pier north of the present International Pier has apparently been excluded. Such an alternative needs to be re-studied."

Cozumel Island is located in the Caribbean Sea, 18 kilometers off the northeastern coast of the Yucatan Peninsula. The region's natural and archaeological wonders have attracted an ever-increasing number of tourists over the years. Cozumel is also a strategic port for the arrival of cruise ships traveling from Florida to the Caribbean and South America. This increasing flow of visitors has rendered the existing International Pier insufficient to handle incoming vessels making necessary the construction of a new pier. Although several alternatives were available for the site of the new pier, the authorized project will construct the pier inside the Cozumel Marine Refuge and in close proximity to the Paraiso Reef,¹ one of the most beautiful and fragile living reefs in the Americas. The fact that the project ostensibly has been based upon legal provisions intended for the protection of the environment requires a hard look over such provisions and, in general, over the entire Mexican environmental policy towards the preservation of its natural resources.

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1. Douglas Fenner, Cruise Ship Pier, Paraiso Reef, Cozumel, An Opinion, s4, *printed in Paraiso: A Living Reef at Risk*, Project Reef Keeper, Jan. 6, 1995. [On January 17, 1996, the Secretariat of the Commission for Environmental Cooperation received an Article 14 non-governmental organization submission from the Committee for the Protection of Natural Resources. The complaint alleges that the government of Mexico has failed effectively to enforce its environmental law in violation of Article 6 of the Environmental Side Agreement. The circumstances giving rise to the Cozumel Submission stem from a construction venture known as the "Mayan Gate Project." This article details the facts underlying the submission, including the specific laws and regulations which the submission alleges were inadequately enforced. A more complete description of the procedure followed by the Secretariat when evaluating such submissions, as well as an overview of several previous submissions, are contained in Marcus Williams, Comment, *Article 14 Non-Governmental Organization Submissions under the Environmental Side Agreement: Foundations, Justiciability and Implications for Future Challenges*. Student Editorial Board]
 2. Alexander Stone, *Paraiso: A Living Reef at Risk*, Project Reefkeeper, Jan. 6, 1995, at 9.

It is this author's argument that the instruments of environmental policy currently in force in Mexico are ill-conceived and were misunderstood when incorporated into the Mexican legal system. This paper will analyze the process in which the proposed new pier was authorized, the main focus being the inefficiency of the existing instruments, particularly of the environmental impact evaluation and authorization procedures, to protect Mexico's limited resources from aggressive environmentally destructive developers. To this end, I will briefly examine the facts leading to the authorization of the project. I will then explore the legal framework currently in force for the protection of Mexico's natural resources. Finally, I will analyze the loopholes that render our environmental protection legislation ineffective.

I. The Authorization Process

The need for a new pier led the Mexican Ministry of Communications and Transportation (SCT), to issue, on September 5, 1989, an international public summons for the construction of port infrastructure at Cozumel Island.³ In response to the summons, Consorcio de Desarrollos y Promociones Inmobiliarias H., S.A. de C.V. (CONSORCIO H), submitted on December 4, 1989, a project known as "Mayan Gate and Cruise Ships' Pier in Cozumel" (hereinafter the "Pier Project" or "CONSORCIO H Pier").⁴ It is relevant to mention that since the submission of the Pier Project, CONSORCIO H has become associated with a tourist megadevelopment called "Mayan Gate," which will be located in an area adjacent to the proposed Pier Project. This property is owned by a subsidiary of CONSORCIO H, Inmobiliaria La Sol, S.A. de C.V. (hereinafter "Inmobiliaria La Sol").

In early 1990, CONSORCIO H filed with the then Ministry of Urban Development and Ecology (SEDUE), now Ministry of the Environment, Natural Resources and Fisheries (SEMARNAP), documentation related to the Pier Project. As a result, SEDUE informed CONSORCIO H that the Pier Project was to be denied because the proposed location was within the protected natural area, known as "Cozumel Reefs." SEDUE stated that construction of the Pier Project would cause a negative impact over several threatened coral species.⁵

Nonetheless, in August 1990, CONSORCIO H filed with SEDUE an Environmental Impact Manifest (hereinafter MIA-90) of the Pier Project. The MIA-90 did not contain any reference to the associated tourist development, "Mayan Gate." The proposed location was not modified. On December 19, 1990, SEDUE authorized the Pier Project based on the information provided in the MIA-90 through official communication 410-3088 (hereinafter "authorization 3088").⁶ This authorization was conditioned upon compliance with 64 conditions. Condition 19 is of particular interest. Condition 19 determined that the authorization was issued only for the construction of the pier, expressly prohibiting the inland construction of buildings and other supporting infrastructure for the pier.

On July 22, 1993, SCT granted CONSORCIO H a concession for the use and exploitation of a maritime federal zone on Cozumel Island for the construction, operation and

3. *Concession for the Construction, Operation and Exploitation of a Public Port Terminal for Cruise Ships at Cozumel Island, Quintana Roo*, Official Gazette of the Federation (Diario Oficial de la Federación) (D.O.), Aug. 11, 1993, Antecedent III, at 7.

4. *Id.* at Antecedent IV.

5. Official communication 410-00994 issued by SEDUE, May 11, 1990.

6. Official communication 410-3088 issued by SEDUE, Dec. 19, 1990.

exploitation of a pier. This pier would become a terminal port for cruise ships (the "Concession").⁷ In addition, CONSORCIO H was obliged to construct, as a part of the terminal port, a passengers' terminal building, an access from the terminal to the pier, a parking lot and an access road to the Chan Kanaab Highway.⁸ It should be pointed out that although Antecedent VI of the Concession mentioned that the environmental authority had issued a favorable resolution regarding the environmental impact for the terminal port, the only environmental impact approval at the time was that referred to the Pier Project, not to the terminal port.⁹

The Concession also required CONSORCIO H to file an "executive project," within three months from the date of issuance of the Concession. This executive project was to be comprised of the new works to be performed, including the environmental impact approval for the construction and operation of the terminal.¹⁰ Finally, the Concession determined that it could be revoked for any of the causes provided for in Article 33 of the Port's Law. The Port's Law,¹¹ in turn, establishes as a cause for the revocation of concessions and permits non-compliance by the concessionaire, in this case CONSORCIO H, of the general obligations and conditions established therein, including those related to environmental protection.¹²

On December 23, 1993, SCT issued official communication 2497-93 authorizing CONSORCIO H to begin constructing the Project Pier, as long as such works were in compliance with authorization 3088. However, official communication 2497-93 also established that before beginning the work on the terminal building in plots adjacent to the pier, an "executive project" should be filed for approval in terms of Conditions One and Five of the Concession.¹³

On October 26, 1994, CONSORCIO H filed a preliminary report for the project "Installation and Operation of a Concrete Plant for the Construction of the Cruise Ship's Pier in Cozumel, Quintana Roo" (hereinafter the "Concrete Plant Project" or "IP-94"). The concrete plant project would provide the Pier Project with the necessary concrete to perform the contemplated works.

On February 16, 1995, CONSORCIO H filed a preliminary report for the so-called "Support Infrastructure for the Cruise Ships' Pier in Cozumel, Quintana Roo" (hereinafter the "Land Works Project" or "IP-95"). On May 23, 1995, INE issued official communication 2137 informing that an Environmental Impact Manifest should be filed instead of the IP-95 in order for the authority to approve the works for the terminal building and other facilities.¹⁴

On June 22, 1995, the Committee for the Protection of Natural Resources (hereinafter the "Committee"), a grassroots organization formed specifically for the protection of the Paraiso Reef, filed a popular denouncement (or "denuncia pública"), against the construction and operation of the Pier Project.

7. Condition One, *supra* note 3.

8. *Id.*

9. Antecedent VI, *supra* note 3.

10. Condition Five, *supra* note 3.

11. *Port's Law*, D.O. July 19, 1993, at 37.

12. Condition Twenty-One, *supra* note 3.

13. Official communication 2497-93 issued by SCT, Dec. 23, 1993.

14. Official communication 2137 issued by INE, May 23, 1995.

II. Protection Framework

A. BACKGROUND: THE PARAISO REEF

The Paraiso Reef consists of three terraces which parallel the shoreline at depths of 5, 10 and 15 meters. The first terrace varies in depth from 0.5 to 4 meters and is composed of hardground between the International Pier and Punta Tunich. A 5 meter wide fringe reef is located along the shore of this first terrace. The first and second terraces are separated by a 5-meter wide step which drops from 4 to 10 meters. This first step (approximately 60 meters from shore) forms a nearshore fringing reef. A second step (approximately 250 meters from shore), dropping from 10 to 15 meters, and separating the second and third terraces, is described as a terrace-edge reef consisting of three distinct regions: (i) three large 10-by-84-meter "bolones" approximately 400 meters south of the International Pier, (ii) a 20-by-100-meter midshelf reef, and (iii) a 20-by-300-meter patch reef. All three regions parallel the shore and are separated by sand channels approximately 50 meters wide. Finally, on the seaward side of the second step, a third terrace extends from the shelf edge to a depth of approximately 30 meters.¹⁵

B. LEGAL STRUCTURE FOR THE PROTECTION OF NATURAL RESOURCES

1. During the 1970's, several technical studies were performed by the then Mexican Fisheries Department to Cozumel's coastal reefs. Those studies showed a distinct reduction in reef flora and fauna due to commercial and sport fishing activities.¹⁶ In order to prevent further damage to the reef's ecosystem, on June 11, 1980, the Fisheries Department issued a decree stating that, "the west coast of Cozumel Island is declared a refuge zone for the protection of its marine flora and fauna" (hereinafter the "Cozumel Marine Refuge Decree" or "Refuge Decree").¹⁷ The Cozumel Marine Refuge was determined to comprise a line along the shore beginning at the Fiscal Pier down to southern Punta Ce-Larain.¹⁸ The Refuge Decree prohibited commercial and underwater sport fishing activities and the collection of marine flora and fauna, except for scientific investigation purposes.¹⁹

2. On March 9, 1987, Quintana Roo's government issued a "Decree declaring the land uses, destinies and reserves for Cozumel Municipality" (hereinafter the "Zoning Decree").²⁰ Section II of the Zoning Decree, corresponding to the island sector of the municipality, provides in subsection 7 that the port zone (both for cargo and passenger purposes) would be the area between the Fiscal Pier and the existing International Pier. The Zoning Decree expressly prohibited the creation of additional port zones in the island. It should be men-

15. Edward W. Burkett, *Quantification of Community Structure of Paraiso Nearshore Fringe Reef, Cozumel, Mexico*, Feb. 1, 1995, at 2.

16. Decree by Means of which the West Coast of Cozumel Island is Declared a Refuge Zone for the Protection of its Marine Flora and Fauna, D.O. June 11, 1980, printed in Official Gazette of the Federation, at 13.

17. *Id.*

18. *Id.*

19. *Id.* at art. 2.

20. *Decree Declaring the Land Uses, Destinies and Reserves for Cozumel Municipality*, Official Gazette for Quintana Roo's State, Mar. 9, 1987, at 7.

tioned that the CONSORCIO H Pier will be located south of the International Pier directly above the northernmost section of the Paraiso Reef.

3. In accordance with the regulations promulgated under the Fisheries Law, a Refuge Zone is an area within federal jurisdiction waters, with the main purpose of preserving and contributing, either in a natural or in an artificial manner, to the development of the aquatic flora and fauna, as well as preserving and protecting the surrounding environment.²¹

4. The General Law for the Ecological Equilibrium and the Protection to the Environment (hereinafter the "Environmental Law")²² provides that the areas for the protection of flora and fauna, such as the Cozumel Marine Refuge, shall be considered as "protected natural areas," subject to the protection of the Federation as ecological reserves, for the purposes, effects and modalities provided for in the Environmental Law or in other applicable legislation.²³ In the aquatic flora and fauna protection areas, according to the Environmental Law, permitted activities include only those related to the preservation, repopulation, propagation, acclimatization, refuge and investigation of such species. The exploitation of a protected area's natural resources can be authorized subject to the compliance with those technical standards and land use provisions provided for in the bill establishing the refuge zone.²⁴ The protection, administration, development and surveillance of the aquatic flora and fauna protection area is legally entrusted to SEMARNAP.²⁵

C. THE ENVIRONMENTAL IMPACT EVALUATION PROCEDURE

The Environmental Law establishes that any work or activity which may cause ecological unbalance or exceed the limits and conditions provided for in the technical norms, must be previously authorized by the Federal or local government, in conformance with their respective jurisdictions.²⁶ As any other activity related to the general means of communication, the Pier Project is under federal jurisdiction for environmental impact purposes.²⁷

The Regulations on Environmental Impact (REI),²⁸ provide for three different, yet complimentary tools for environmental impact evaluation: i) a preliminary report, to be presented whenever the proposer of the activity or work believes that the activity or work will not cause an environmental unbalance nor exceed limits established in the applicable technical norms; ii) an environmental impact manifest, applicable when the activities or works may cause unbalance or exceed norm limits, and iii) risk studies, when the proposed activity or work is considered as highly risky.²⁹ In addition, there are three different types of environmental impact manifests: general, intermediate and specific. As a general rule, the proposer is required to file a general environmental impact manifest. However, the agency is empowered to request an intermediate or specific manifest whenever it becomes necessary to have more detailed information about the proposed activity or work.³⁰

21. *Regulations to the Fisheries Law*, D.O. July 21, 1992, art. 2, para. XXIII.

22. *General Law for the Ecological Equilibrium and the Protection to the Environment*, D.O. Jan. 28, 1988.

23. *Id.* at arts. 44, 46.

24. *Id.* at art. 54.

25. *Id.* at art. 74.

26. *Id.* at art. 28.

27. *Id.* at art. 29.

28. *Regulations on Environmental Impact*, D.O. June 7, 1988.

29. *Id.* at arts. 5-7.

30. *Id.* at art. 9.

Although the REI establishes the minimum information to be contained in a preliminary report or in a manifest, it expressly provides that the precise information to be included in those reports will comply with the *Instructivos* or directives to be published by SEMARNAP.³¹ The *Instructivo* for the preliminary report requires the proposer of the activity or work to furnish information regarding land use regulations applicable to the site where the project will be developed, as well as alternative sites for the project.³² No prevention nor mitigation measures are contemplated. On the other hand, the *Instructivo* for the environmental impact manifest in the general modality does require information on associated projects, growing expectations, compliance with land use regulations, identification of environmental impacts, and prevention and mitigation measures, among other relevant information.”³³

While there are some articles in the REI establishing norms which the environmental impact evaluation should meet, most of them establish time limits for the presentation of reports, manifests or studies, as well as for the corresponding resolution by the authority. Articles 16 and 17 of the REI refer to the legislation that must be also considered for the evaluation. Articles 36, 37 and 38 refer specifically to federally protected natural areas. Not a single provision establishes the method, system, rules or principles that must guide the decision-making process, how to weigh competing or plainly uncongenial factors, the limits and scope of the authority's discretion, etc.

As incorporated into Mexico's legal system, the environmental impact evaluation lost its primary purpose: serving as a decision-making tool through the assessment and discussion of reasonable alternatives for the realization of a proposed activity or work, in order to avoid or minimize adverse impacts upon the environment. Currently, the main instrument of evaluation, the environmental impact manifest, is nothing more than a disclosure document, an information-gathering effort to justify a proposed work or activity. Discussion of alternatives are ignored outright; the imposition of mitigation measures became the authority's favorite strategy against environmentally-harmful projects.

III. A Closer Look: The Path to Faulty Decision-making

The existing environmental legal framework has been praised by some scholars as an advanced and comprehensive tool for the protection of Mexico's natural resources. Real world cases, as the one analyzed in this document, expose the fragility of the environment and the misunderstanding of the law's purpose. A close look at the Pier Project environmental impact evaluation and authorization process shows, step by step, the deficiencies of the framework, but more importantly, the gaps that must be bridged in order to use efficiently the available legal tools to protect our diminished and rapidly vanishing natural resources.

31. *Id.*

32. *Directive for the Preparation of the Preliminary Report Referred to in Articles 7 and 8 of the Regulations on Environmental Impact*, Ecological Gazette, Sept. 1989, at 88.

33. *Directives for the Preparation of the Environmental Impact Manifest in the General Modality Referred to in Articles 9 and 10 of the Regulations on Environmental Impact*, Ecological Gazette, Sept. 1989, at 88.

A. THE REAL "SCOPE" OF THE PIER PROJECT

1. *Piecemealing: Avoiding Cumulative Effects*

In accordance with Section 1.5 of the Instructivo for the preparation of environmental impact manifests, the proposer must explain whether environmental impact statements are required prior to the development of the proposed activity or project.³⁴ However, CONSORCIO H's MIA-90 only mentioned an "associated project" consisting in adapting the facilities of the International Pier in order to jointly provide a better service to the tourism.³⁵ Activities clearly within the "associated project" definition such as the Concrete Plant Project and the Land Works Project, were plainly omitted from the MIA-90. CONSORCIO H's omission resulted in the segmentation of an otherwise comprehensive environmental impact evaluation that should have included the adverse cumulative effects of the three related projects. In addition, no mention was made to the "Mayan Gate" project to be developed by CONSORCIO H's subsidiary Inmobiliaria La Sol in a plot adjacent to the proposed Pier Project. The environmental authority had known of the "Mayan Gate" project since 1986, when SEDUE granted a concession to Inmobiliaria La Sol for the use and exploitation of that plot for tourist purposes.³⁶ Notwithstanding the omission on CONSORCIO H's part in including the "Mayan Gate" project in the MIA-90, it is inexcusable that SEDUE had not requested CONSORCIO H to extend the scope of the MIA-90, given its prior knowledge of such an obviously connected project.

The MIA-90 omissions, the lack of parameters or guidelines of evaluation, and the careless review by SEDUE of an environmental impact manifest not prepared in accordance with the corresponding instructivo, prevented an adequate assessment of the adverse environmental impacts that the Pier Project might have upon the Cozumel Marine Refuge and to the surrounding environment.

2. *Re-Defining the Project Subject to Evaluation*

a. The MIA-90 was prepared to analyze the environmental effects of the construction of a pier. The resulting authorization 3088 acknowledged the limited scope of the MIA-90 by establishing that the authorization was issued only for the construction of the pier, and expressly prohibited the inland construction of buildings and other supporting infrastructure for the pier.³⁷ Notwithstanding the foregoing, the Concession granted by SCT to CONSORCIO H wrongly stated, in its Antecedents section, that SEDUE had already authorized the environmental impact expected to result from the construction and operation of the terminal port in the Concession.³⁸

34. *Id.* at 89.

35. MIA-90, at 6.

36. Antecedent VII, *supra* note 3.

37. Condition Nineteen, *supra* note 3.

38. Antecedent VI, *supra* note 3. It should be mentioned that the Concession refers to a favorable resolution on environmental impact contained in two official communications, the first dated June 19, 1992, and the second dated May 26, 1993. These communications, however, did not contain a resolution by themselves, but rather, extended the lifespan of authorization 3088.

b. The Mexican Port's Law³⁹ defines "terminal port" as the unit, established inside or outside a coast, constituted by works, facilities and surfaces, including the water zone."⁴⁰ Thus, the evaluation of a proposed activity consisting in the construction and operation of a "terminal port" must consider the adjacent facilities (including piers and passenger's buildings), works and installations that are part of such a "unit." The Port's Law applicability to the Concession was specifically accepted by CONSORCIO H.⁴¹

c. As a consequence, the following conclusions must be drawn:

(i) The MIA-90 was restricted to the analysis of the Pier Project, a very limited project which did not assess the cumulative effects of its several associated and adjacent projects. Authorization 3088 was restricted only to the evaluation of the pier and it should not have been considered as an adequate evaluation for the entire "terminal port" project, as stated by SCT in Antecedent VI of the Concession.

(ii) By the time the Concession was granted, the permitted facilities were not those to which Pier Project was restricted (the construction and operation of a pier), but a "terminal port" encompassing the whole port construction and operation as defined in the Ports Law, legislation chosen by CONSORCIO H to govern the Concession.

(iii) The Port's Law redefined the scope of the project to be environmentally evaluated. Being a "terminal port," an evaluation as the one that gave place to authorization 3088 should have been considered, at best, partially inadequate, SCT having had the obligation to request a new and comprehensive environmental impact manifest for the entire "terminal port" project.

B. CONSIDERATION OF ALTERNATIVES: RELOCATION FORGONE

In accordance with section 2.9, "alternative sites that had been evaluated," of MIA-90, "the project was based on a study carried out by the General Direction of Maritime Works (SCT) in which it was considered, as an alternative site for resolving the need for a longer dockage in Cozumel, the prolongation of the existing touristic pier (the International Pier) or the prolongation of the fiscal pier located in front of the San Miguel de Cozumel town, however, their own characteristics, specifically the bathymetric configuration, make these possibilities to result antieconomic, for which reason it was decided the location of the cruise ship's pier (CONSORCIO H Pier) 400 mts south of the existing touristic pier (the International Pier)[sic]."⁴²

39. Port's Law, *supra* note 11.

40. *Id.* at art. 2, para. IV.

41. Antecedent X, *supra* note 3. The acceptance of the Port's Law applicability is relevant. The Concession was applied for and negotiated with SCT based on several provisions from both the Law of General Means of Communications (LGMC) and the Law for Maritime Navigation and Commerce (LMNC), which were derogated by the Port's Law. Transitory Article Six of the Port's Law allowed those individuals or entities having applied for a concession prior to the issuance of the law to choose if the corresponding concession was to be governed by the Port's Law provisions or by those of the LGMC and LMNC.

42. MIA-90, at 8.

No further mention regarding alternatives is included in MIA-90 nor is their consideration requested as an element of an environmental impact manifest in the corresponding *instructivo*. Additionally, the SCT's study, referred to in section 2.9, was not even attached to the MIA-90.

As has been recognized by other legislation,⁴³ the consideration of alternatives is the heart of an environmental impact statement, where the proposal and all other reasonable alternatives are shown in a comparative format to define outstanding environmental issues and provide the necessary basis for choice among options.

In the case under study, the alternative-related discussion is restricted to that of the site of the Pier Project, leaving out any other environmentally relevant considerations, such as construction techniques, materials used, operation risks, position of the pier, relocation of reef structures, disturbances to the seabottom while constructing and during operations, etc. Even the discussion regarding the site of the project is clearly inadequate. Section 2.9 of MIA-90 refers to a study prepared by SCT in which only two alternatives are proposed. No figures, statistics or other technical or environmental information is provided to support their elimination besides the statement that they were "antieconomic."

While the question of why other reasonable alternatives were not considered immediately stands out (among them the obvious one of having the pier constructed in some other location along Cozumel's coasts), a possible and probable answer may be found in the fact that CONSORCIO H's subsidiary, Inmobiliaria La Sol, already owned a plot adjacent to that where the proposed Pier Project was to be located. As mentioned before, a concession for its use and exploitation for tourist purposes was granted by SEDUE.⁴⁴ The proximity of the plots, the strategic function of the pier as a feeder of potential customers for the proposer's tourist project, and the amount of resources already committed to such an ambitious enterprise, may explain why no other alternative site was considered in the MIA-90.

Under this view, it is clear that the MIA-90 was a document prepared to serve not as a tool for environmentally sensitive decision-making, but rather, to justify a decision already taken by the developer and negligently concealed by Mexican authorities.

C. VIOLATION OF SUBSTANTIVE LEGISLATION

Faulty decision-making in this case derived not only from the lack of procedural guidelines to focus the authority's judgement, but also from the violation of laws and ordinances specifically issued for the protection of the environment.

1. *Disregard of Preservation Laws*

The Pier Project, as authorized, will be constructed within the Cozumel Marine Refuge, an area which was specifically protected from commercial and underwater sport fishing activities and the collection of marine flora and fauna.⁴⁵

43. CEQ Regs. s. 1502.14.

44. Antecedent VII, *supra* note 3.

45. Refuge Decree, *supra* note 16.

CONSORCIO H and SEMARNAP have argued that the literal terms of the Refuge Decree permit any activities not specifically prohibited.⁴⁶ This simplistic affirmation does not resist a deeper legal analysis. Yes, the Refuge Decree does contain specific prohibitions against activities that were recognized as having caused damage; however, these prohibitions are not the essence of the Refuge Decree, but the protection intended to be given to the local marine flora and fauna. The very definition of a Refuge Zone, contained in the Fisheries Law,⁴⁷ emphasizes as its primary purpose the following: preserving and contributing to the development of aquatic flora and fauna and the surrounding environment.

The Pier Project could hardly be considered the best means to reach the preservation and developing goals provided for in the Fisheries Law.

These very goals are consistent with those intended in the Environmental Law for the natural protected areas, which include those destined for the protection of flora and fauna by the the Environmental Law or by other applicable laws, such as the Fisheries Law.⁴⁸ The Environmental Law specifically provides that in aquatic flora and fauna protection areas there would *only* be allowed activities related to their preservation, repopulation, propagation, acclimatization, refuge and investigation.⁴⁹ As a consequence, although the Refuge Decree specifically prohibits certain activities, it cannot be interpreted that all those activities not included in the prohibition are to be permitted. This understanding (embraced by SEMARNAP) would have the Refuge Decree as the only provision to be complied with as regards the Cozumel Marine Refuge, consequently ignoring the national legal framework intended for the protection of all natural protected areas, including the latter. On the contrary, the opposite interpretation is the only viable construction of the law, that is, that the provisions of the Refuge Decree are indeed complemented by those applicable to both the Fisheries Law and the Environmental Law. Only under this premise can the Mexican environmental policy towards the protection of natural resources be effectively understood and applied.

SEMARNAP's validation of authorization 3088, issued by its predecessor SEDUE,⁵⁰ resulted in the factual abdication of authority entrusted to it by Congress to protect federal natural areas.

2. *Disregard of Land Use Regulations*

Section IV of the Instructivo for the preparation of the environmental impact manifests in the general modality. "Relationship with land use norms and regulations," requires the proposer to verify that the use of the land being developed corresponds to established norms and regulations.⁵¹

46. Official communication DG/003/988/95 issued by the Attorney General's Office for the Protection of the Environment (*Procuraduria Federal de Proteccion al Ambiente*), Sept. 15, 1995, in response to the popular denunciation filed by the Committee for the Protection of Natural Resources (*Comite para la proteccion de los Recursos Naturales, A.C.*)

47. *Regulations to the Fisheries Law*, *supra* note 21.

48. *General Law for the Ecological Equilibrium*, *supra* note 23, at art. 44.

49. *Id.* at art. 46.

50. See related discussion, *supra* note 38.

51. *Directives for the Preparation of the Environmental Impact*, *supra* note 33, at 93.

The corresponding section of MIA-90 CONSORCIO H does not make any reference to the Cozumel Municipality's 1987 Zoning Decree,⁵² which establishes that the only permitted port zone would be the area between the Fiscal and the International piers, expressly prohibiting the creation of new port zones in the Island.⁵³

Since CONSORCIO H omitted, and SEDUE ignored, the provisions of the Zoning Decree, it is clear that the environmental evaluation that led to the issuance of authorization 3088 was flawed by not having considered such an extremely important piece of legislation. It is our conviction that this omission is sufficient to question not only the soundness of the evaluation process, but that of the conditions and mitigation measures imposed upon CONSORCIO H in authorization 3088.

D. Ongoing Procedural Violations

Procedural irregularities did not stop at the environmental impact evaluation and authorization stage. In fact, they have continued up to this date.

The Fifth Condition of the Concession imposed upon CONSORCIO H the obligation to present an "executive project" of the "terminal" subject-matter of the Concession, to which the environmental approval should be attached, within three months following its issuance. On December 23, 1993, in response to the submission of an "executive project" for the pier by CONSORCIO H, SCT issued official communication 2497-93 authorizing CONSORCIO H to begin the Pier Project's construction, but conditioned construction of the passenger's building on the approval of yet an additional "executive project" to be filed within the terms of the First and Fifth Conditions of the Concession.⁵⁴

The segmentation of an "executive project," that in accordance with the Concession should have encompassed the entire "terminal port" project as defined in the Port's Law, must be considered a breach by CONSORCIO H of an obligation contained in the Fifth Condition of the Concession. CONSORCIO H was granted three months, as of the day of the issuance of the Concession, to file the approval for the environmental impact caused by the construction and operation of the "terminal." This period was not extended by SCT.

Both SCT's official communication 2497-93 and SEMARNAP's official communication 2137 requesting CONSORCIO H to file an environmental impact manifest for the Land Works Project,⁵⁵ confirm that at least up to the latter date CONSORCIO H had not obtained the environmental approval in order for the "terminal port" project to be authorized in accordance with the Fifth Condition of the Concession.

Such a breach of CONSORCIO H's obligation violates article 33 of the Port's Law which establishes as a cause of revokal of a concession the non-compliance of environmentally-related obligations and conditions. Additionally, said breach triggers the revokal clause of Concession's Condition Twenty First.

52. MIA-90 at 45.

53. *Decree Declaring the Land Uses*, *supra* note 20.

54. Official communication, *supra* note 13.

55. Official communication 2137 issued by SEMARNAP, Feb. 16, 1995.

E. *The Fight for the Effective Application of the Law*

The failure of the Mexican agencies entrusted to effectively apply the environmental legislation to protect the Cozumel Marine Refuge, led interested citizens to form an *ad-hoc* non-governmental civil organization, the Committee for the Protection of Natural Resources (*Comité para la Protección de los Recursos Naturales*). On June 22, 1995, the Committee filed with the Attorney General's Office for the Protection to the Environment (*Procuraduría Federal de Protección al Ambiente*) (PROFEPA), SEMARNAP's enforcement arm, a popular denunciation against the granting of the Concession by SCT to CONSORCIO H.⁵⁶ The committee's act was based upon the right granted in the Environmental Law to any person to denounce an act, event or omission which may cause an ecological unbalance or harm to the environment in violation to the Environmental Law or other related regulations.⁵⁷ The Committee's popular denunciation exposed most of the reasoning and evidence herein discussed along with several other legal and technical arguments.

In accordance with the Environmental Law, the authority is only obliged to verify the facts which are the subject of denunciation and to inform the result to the denouncing party within the following thirty-working day period as of the day the denunciation was filed.⁵⁸ PROFEPA issued, on September 15, 1995 (well behind the time limit established in the Environmental Law), a response to the popular denunciation basically confirming the legality and validity of each and every decision, resolution, authorization and action taken by SEMARNAP and its predecessors and by SCT.⁵⁹

While PROFEPA's response actually confirms most of our claims regarding the government's defective evaluation of the environmental effects caused by the Pier Project to the Paraiso Reef, a serious discussion on the merits of such a document would require of an examination beyond the purpose of the present article. It is, however, imperative to point out that the government's response is plagued by the same discretionary, and sometimes plainly arbitrary, interpretations of the law and the environmental impact evaluation procedure that misguided the government's performance as originally challenged by the Committee and highlighted in the present text.

Due to the inadequacy of the government's response to the popular denunciation, on January 8, 1996, the Committee filed a brief with the North American Commission for Environmental Cooperation (NACEC) denouncing the lack of effective application of the environmental laws by Mexican authorities (in terms of Articles 14 and 15 of the North American Agreement on Environmental Cooperation).⁶⁰ Once the denunciation is admitted, NACEC will develop a factual record.⁶¹

56. *Popular Denunciation Presented by the Committee for the Protection of Natural Resources against Consorcio de Desarrollos y Promociones Inmobiliarias H, S.A. de C.V.*, filed before PROFEPA, June 22, 1995.

57. *General Law for the Ecological Equilibrium*, *supra* note 22, at art. 189.

58. *Id.* at art. 193.

59. Official communication, *supra* note 46.

60. North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994).

61. *Id.* at art. 15.

Although it is expected that NACEC's investigation will confirm a lack of effective application of Mexican environmental legislation, what is sought is the issuance of recommendations to the Mexican authority to revoke the Concession, authorization 3088 and all other resolution regarding the construction of the pier at *the location* proposed by CONSORCIO H.

NACEC will also have the historic opportunity to influence and encourage the revision of existing inefficient Mexican environmental provisions if it decides to effectively fulfill the very first objective for which it was created: to foster the protection and improvement of the environment for the well-being of present and future generations.⁶²

VI. Conclusion

Mexico is losing its natural resources at an accelerated rate. Consequently, the appropriate Mexican authorities must intervene to prevent the deterioration of the nation's natural resources and promote their enhancement. It is especially crucial that the authorities intervene where the existence of an ecosystem, a species, a forest, a reef, for that matter, is at stake. As evidenced, the current procedure for the evaluation of the environmental aftermath of a given project does not guarantee that the best environmentally-protective alternative for its fulfillment is satisfactorily appraised before the decision to proceed with it is taken by the proposer. Quite the opposite. As illustrated in the Paraiso Reef case, the Mexican environmental impact evaluation does not demand an in-depth consideration of alternatives, it only documents (and even this barely accurately) some of the harm that will certainly be inflicted upon the environment and the proposed mitigation measures. Under this scheme, prevention can only be an aspiration.

To be sure, the thrust is not to stop development, but to reasonably ensure that it follows the less environmentally damaging path. No one can deny the importance, nor the necessity for a new terminal port in Cozumel. It is the decision-making procedure which is criticized. After a serious consideration of alternatives, it may appear that the current location for the terminal (and the pier) is the less harmful. It may not. In any event, the final decision would not be the result of a defective and arbitrary evaluation, but of a reasoned decision-making process. This is a process that is currently lacking.

The debate concerning the Paraiso Reef incident bestows upon us an unique opportunity to focus on the vital changes that the Mexican environmental legislation must endure so that similar cases may not be repeated again. The main deficiencies have already been exposed and the solutions already sketched in the body of this document. Lets discuss them and confront them—NOW!

As of January 1996, concrete piles have been driven for 180 meters of the planned 257-meter CONSORIO H's pier at Cozumel coasts,⁶³ is it too late?

62. *Id.* at art. 1(a).

63. The News, Jan. 19, 1996, at 14.